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REMARKS

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BEFORE

THE WILLIAM O. DOUGLAS INQUIRY CONVOCATION

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I am pleased to be here on this occasion as the representative of Director Webster to join you in this tribute to Justice William O. Douglas, a man whose devotion to civil liberties is known to all of us. It is perhaps fitting that this convocation comes at a time when there is widespread concern that some of the major institutions of government have been used in ways that are careless of the higher values of our society.

I recall that Professor Paul Freund once began an essay by quoting an ancient Chinese curse that carried, he said, a terrible doom -- "May you live in a time of transition." I thought that was an appropriate theme for my discussion today because the FBI and, indeed, the entire intelligence community is living in a time of transition. Old assumptions are being questioned and the basic premises of our institutions are being challenged. It is charged that we have been allowed to edge out of control, to be guided on occasion by partisan politics, and to develop habits that are troublesome to a nation that aspires to live by the rule of law. It has been a painful experience particularly for institutions that have for so long enjoyed a high measure of public esteem.

But a transition can also mark a period of growth and renewed vigor. The past five years have forced us to rethink our missions, our methods and the limits of our authority. If nothing else the process may highlight our strengths and weaknesses and make it more likely that we will do something about our shortcomings. In the long run, I believe it will result in a new confidence in ourselves and the rebuilding of the public's confidence in our agencies.

My own view is that the problems and excesses of the past stemmed largely from our own failure to evaluate our mission and responsibilities and the failure of government itself to clarify the law and to provide adequate guidance in difficult times. While this may be true of all government agencies, to some extent, it is particularly true of agencies with intelligence responsibilities. By their very nature, those responsibilities are greatest at times of crises when fundamental conflicts between public safety and individual rights are sharpest. If the law does not address these conflicts, intelligence agencies are left to deal with the problems as best they can. Under those circumstances, it is not surprising that there may be an occasional abuse of discretion or lapse of judgment. Fortunately, our time of transition coincides with a period of relative calm. We have the opportunity to clarify the law governing our intelligence agencies and to define appropriate limits of conduct without undue pressures of international or

domestic disorder. The primary question is whether we have the will to confront the fundamental issues at a time when events do not demand immediate answers.

The problems are not simple. Evolving solutions probably will and should come -- as they have in the past -- from a combination of legislation, executive orders, internal procedures and court decisions. But the executive branch has done much in the last few years to confront the important issues of civil liberties and has taken several major steps, on an interim basis, to define the proper scope and limits of the activities of its intelligence agencies. I would like to discuss some of these measures this afternoon and to share with you some of our tentative thoughts on a legislative charter for the FBI.

In 1976 President Ford issued an executive order on U. S. foreign intelligence activities. That order replaced Presidential directives and statements dating back to the Roosevelt Administration and established an organizational structure for the intelligence community. A new executive order was signed last January by President Carter which further defined the duties and responsibilities of the intelligence agencies. It sets forth restrictions and limitations on intelligence activities and requires each agency to adopt procedures governing the use of certain collection techniques.

These procedures must be approved by the Attorney General, who is instructed to make sure that intelligence activities directed against Americans are conducted by the least intrusive means possible. Attorney General Bell called the new executive order "the cornerstone of our efforts to construct better and safer systems for intelligence activities."

The first major step in converting these interim measures to permanent legislation was the enactment this year of the Foreign Intelligence Surveillance Act, providing legislative authority and judicial warrants for electronic surveillance in the area of foreign intelligence.

An equally important development in the area of FBI activities is the promulgation of Attorney General guidelines. Shortly after he took office, Attorney General Levi appointed a committee in the Department of Justice to develop a comprehensive set of guidelines to cover the whole range of the Bureau's investigative activities. The first and most controversial set of guidelines drafted by the committee dealt with domestic intelligence investigations. For decades the FBI had been conducting investigations of groups suspected of being involved in "subversive" activities. Unlike criminal investigations they were not based on specific criminal violations nor did they have an obvious termination point. And since they focused on politically active individuals or groups, these investigations involved values close to First Amendment rights.

The most important feature of the guidelines is that they tie domestic security investigations closely to a violation of Federal law. The guidelines also provide for much greater involvement by the Department of Justice and the Attorney General in reviewing these investigations. They have shifted the focus of domestic security investigations from long-term monitoring of so-called "subversive groups" to concentration on actual terrorist activities.

A separate set of guidelines regulates the FBI's foreign intelligence collection activities and foreign counterintelligence investigations. Some portions of these guidelines are classified, so I cannot discuss them in detail. Without being too specific, I can say that investigations of citizens and resident aliens must be reviewed periodically by the Department of Justice. These reviews are conducted by officials designated by the Attorney General. With regard to foreign visitors, distinctions are made on the status of their entry into this country and the foreign power whose interest they serve. Greater investigative attention is permitted with regard to countries which engage in intelligence activities contrary to the interests of the United States. Standards are established for initiating investigations and for the methods of collection which are permissible in a given situation. Special rules are also applied to insure that

domestic groups which are targeted for infiltration by foreign powers are not subjected to unwarranted intrusion by our own government. Those techniques which may be particularly intrusive require the Attorney General's personal authorization.

These steps -- executive orders and guidelines -- have been an important part of the transition period. But they must be recognized as temporary measures. The final decision on the role and authority of intelligence agencies, and particularly of the FBI, must be made by Congress in the form of permanent legislation. Two efforts are currently underway. We are working on a charter to govern all agencies involved in foreign intelligence activities, including the intelligence components of the FBI. At the same time, the Department of Justice is preparing legislation to define FBI responsibilities in all areas outside the field of foreign intelligence and counterintelligence. Today I would like to concentrate on this latter area.

You should understand that presently the statutory jurisdiction of the FBI rests on general legislation which gives the Attorney General the power to appoint officials "to detect and prosecute crime against the United States." Other statutes vest in the Bureau specific responsibilities to investigate particular types of violations. The same general legislation which gives criminal investigative authority also

allows the Attorney General "to appoint officials to conduct such other investigations regarding official matters under the control of the Department of Justice and the Department of State as may be directed by the Attorney General." This provision and the authority of the President exercised through executive orders, and presidential statements or directives have been the foundation of the Bureau's counterintelligence operations and of certain investigative activities that do not necessarily relate to criminal prosecution.

It is important to bear in mind, at the outset, that this is an unprecedented exercise in the legislative process. We are, for the first time, trying to articulate the circumstances in which the government may properly initiate an inquiry concerning its citizens. Historically these judgments have been left to the executive branch as an exercise of administrative discretion so long as those inquiries do not infringe on any statutory or Constitutional right. This is certainly a proper subject of Congressional interest but we are concerned about the possibility of excessive legislative detail. If a charter imposes rigid directions governing every step in the investigative process, it could sacrifice the flexibility that the FBI needs to adapt to the diverse factual situations it must face. Rigid statutory provisions would also invite litigation at every

step in the investigative process and could well be used by some to frustrate legitimate law enforcement efforts without achieving the measure of control intended by Congress. As Lord Devlin has said, "As soon as anything has been codified there is a lawyer-like -- but sometimes unfortunate -- tendency to treat the written word as if it were the last word on the subject and to deal with each case according to whether it falls on one side or the other of what may be a finely drawn boundary."

The effort to articulate a basis for investigation raises the fundamental question of whether the FBI should be authorized to conduct "intelligence" investigations. I think the answer depends in large part on how we define the term "intelligence." We certainly agree with former Attorney General Levi that "Government monitoring of individuals or groups because they hold unpopular or controversial political views is intolerable in our society." With the exception of background investigations for Federal employment purposes or foreign counterintelligence responsibilities, the focus of investigation must be on the detection and prosecution of unlawful conduct.

But I think we should recognize that investigations of criminal enterprises, whether in the organized crime or domestic security field, differ in several important respects from an ordinary criminal investigation. As a practical matter,

the organization provides life and continuity of operation that are not normally found in regular criminal activity. As a consequence, these investigations may continue for several years. In addition, as Justice Powell noted, the focus of domestic security investigations "may be less precise than that directed against more conventional types of crime." Unlike the usual criminal case there may be no completed offense to provide a framework for the investigation. It often requires the fitting together of bits and pieces of information, many meaningless by themselves, to ascertain if there is a mosaic of criminal activity. For this reason, the investigation is broader and less discriminate than usual, involving "the interrelation of various sources and types of information." When the term intelligence is used in this context it refers to the process of information collection rather than the end product of investigation. It is important to bear these distinctions in mind and to have a common understanding of the terms so that we do not enact a charter that gives the Bureau both more and less authority than it needs to fulfill its investigative responsibilities.

This leads us then to the question of how we are going to deal with domestic security investigations. There are those who believe that these investigations should be discontinued altogether and that the Bureau should accomplish

its investigative needs through normal criminal investigations. One of the problems with this approach is that it seems to misconceive both the scope and purpose of an ordinary criminal investigation. As I indicated earlier, the investigation of a completed criminal act is normally confined to determining who committed the act and with securing evidence to establish the elements of the particular crime. It is, in this respect, self-defining. An investigation of an ongoing criminal enterprise, focused on a pattern of criminal activity, must determine the size and composition of the group involved, its geographic dimensions, its past acts and intended criminal goals, and its capacity for harm. While a standard criminal investigation terminates with the decision to prosecute or not to prosecute, the investigation of a criminal enterprise does not necessarily end when one or more of the participants has been prosecuted. Thus, limitations that are appropriate to the usual criminal investigation could result in foreclosing investigations directed at organized crime or terrorism.

I recognize, of course, that terrorism investigations present special problems because they deal with politically motivated acts. As Justice Powell pointed out, "There is often a convergence of First and Fourth Amendment values not found in cases of 'ordinary' crime." Thus, it is important to sort out protected activities from those which may lead to

violence and serious disruption of society. Drafting legislation which draws this fine line is a difficult task.

A related problem concerns the authority of the Bureau to investigate in advance of criminal activity. What is at issue here is the early detection of crime. Preparatory conduct has always been a matter of legitimate concern for society. The conspiracy and attempt laws have been the principal doctrinal devices by which the substantive criminal law has attempted to deal with this problem. That may be adequate for prosecutive purposes. Indeed it makes sense to require a high order of proof before one can be convicted of activities that fall short of the intended harm. But the investigative process must begin well in advance of crime if it is to be effective. This is particularly true where the objectives of investigation, as in domestic terrorism, are to frustrate or minimize the intended acts of violence. The problem comes in knowing how far in advance of crime the government may properly initiate its inquiry. Should it begin at the planning or conspiracy stage or when a crime is "soon to be" or "about to be" committed? If the investigation begins prematurely, it may deal with marginal or speculative threats to society or with entirely innocent conduct. If commenced too late, it becomes difficult if not impossible to gather information which is needed for the government to

respond effectively. It will not be easy to find the right combination of words in a charter to meet these competing concerns.

Even if we succeed in defining the circumstances in which investigations should be conducted, we face equally difficult issues in deciding how a charter should address the methods of conducting the investigation. One area of particular controversy is the use of informants. I do not believe that any serious consideration is being given to an absolute prohibition against the use of informants, but it has been suggested that the charter should bar using certain categories of persons as informants, such as members of the news media, attorneys, clergymen, and persons of minor age. I think all of us understand the impulse that leads to such proposals but I question whether the answer lies in a total prohibition. Situations are certain to arise where persons who are members of the news media, of the legal profession or of certain religious sects are in a position to provide information concerning planned acts of violence that could not be obtained in any other way. It would be a mistake to let any past misuse of informants mislead us regarding their importance in solving crimes, or tempt us to put unworkable restrictions on their use. "Their use creates risks," writes Professor Wilson, "but their absence leads to failure."

The better approach is to deal with each case on its own facts recognizing that there are special concerns to be

considered. It is clear that members of the news media should not be used in ways that might influence editorial policies or news accounts, that attorneys should not provide privileged information about their clients and that minors should not be asked to give confidential information to the government except under the most compelling circumstances. The charter should highlight these concerns, but I am confident that internal management controls and oversight can provide adequate assurance that persons in those categories are not used indiscriminately or in a manner that would conflict with other important public interests.

It has also been suggested that the FBI ought to obtain a warrant before using an informant. It is not clear precisely what role the court would play but one can imagine enormous difficulties in this approach. To begin with, I question the wisdom of bringing the judiciary into the most important and least definable part of the investigative process. At what point in the government's relationship with an individual does one become an informant for the purposes of the statute? What controls would the court exercise over the operation of the informant? Would the judge influence the course or direction of the investigation? Would he review all informant reports, approve investigative leads and perhaps make the subtle day-to-day judgments about credibility and

personality that are necessary. Attorney General Levi cautioned against extending the warrant requirement in this way, warning that it would be a major step toward an alteration in the basic nature of the criminal justice system in America. Unlike the inquisitorial system used in some European countries and elsewhere, our system of justice keeps the investigation and prosecution of crime separate from the adjudication of criminal charges. "The separation is important to the neutrality of the judiciary," he said, "a neutrality which our system takes pains to protect."

The issues I have outlined are only some of the questions we face in drafting a charter for the FBI. But they are major issues reflecting the differences between those whose primary focus is projecting the future of law enforcement and those whose concentration is on preventing a recurrence of the past. Both approaches have legitimacy but they must reach a balance. Dr. Reinhold Niebuhr suggests, "If the Democratic nations fail, their failure must be partly attributed to the faulty strategy of idealists who have too many illusions when they face realists who have too little conscience." If we are to succeed in this charter effort we must apply our ideals in a realistic fashion to decide when and how the FBI is to investigate crimes. As these choices are made it is our responsibility to see them in perspective because they are matters of the greatest importance

to the well being of our society and to the preservation
of essential freedoms. We welcome your help in this endeavor.

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